United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1372

To be argued by:
RICHARD A. GREENBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ANDRE GONZALEZ, Appellant.	Docket No. 75-1372

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the trial judge's refusal to order disclosure of the identity of the Government's informant, who not only introduced the undercover agent to the seller and was present when subsequent narcotics transactions were discussed, but also witnessed the transfer by the seller to the agent of a valuable sample of heroin which was introduced in evidence against appellant, deprived appellant of a fair trial.

2. Whether the trial judge's repeated disparaging and impatient remarks directed at defense counsel, and his excessive interference in the examination of the witnesses, all done in the presence of the jury, reflected an attitude of partisanship which deprived appellant of a fair trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Eastern District of New York (The Honorable John R. Bartels) entered on September 26, 1975, after a jury trial, convicting appellant Andre Gonzalez of two counts of possession and two counts of distribution of heroin, in violation of 21 U.S.C. §841(a)(1). Appellant Gonzalez was sentenced to concurrent terms of five years in prison on each count, with a four-year term of special parole to follow completion of his prison sentence. Gonzalez is currently confined pursuant to the judgment herein appealed.

After appellant's retained trial counsel was relieved, this Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Andre Gonzalez was indicted* on May 8, 1975, by a grand jury in the Eastern District of New York on two

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*The indictment is "B" to appellant's separate appendix.

counts of possessing and two counts of distributing heroin, in violation of 21 U.S.C. §841(a)(1). The indictment resulted from appellant's alleged participation in two narcotics transactions with an undercover agent on January 16 and March 5, 1975. At his two-day trial, commencing on August 4, 1975, before The Honorable John R. Bartels and a jury, the primary evidence of appellant's identity as the principal in the two narcotics transactions was the testimony of the undercover agent who made the purchases. It was also disclosed at trial that the undercover agent had been introduced to appellant on January 8, 1975, by an informant whose identity the Court refused to require the Government to disclose, despite appellant's request for it.

The Trial

Horace Balmer, an undercover detective employed by the New York City Police Department and assigned to the New York Drug Enforcement Task Force, testified that he first met appellant on January 8, 1975, at an apartment located at 725 Fourth Avenue in Brooklyn (56-57*). Appellant was alone when Balmer was introduced to him by an informant working for the Task Force who accompanied Balmer to the apartment (57, 93, 125, 148). Balmer did not know the identity, but

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*Numerals in parentheses refer to pages of the transcript of the trial.

only the number, of the informant, to whom he had been introduced earlier the same day by members of the Task Force (94-95). The informant was given the appellation "Mr. X" by the Court for purposes of the trial (93). The informant was present on January 8 when Balmer had a discussion with appellant, in English,* concerning the purchase of heroin (58-59, 148). During the course of the discussion, with the informant still present, Balmer testified that appellant gave him a "sample" of brown rock known as "Chinese" heroin as an indication of the kind of heroin Balmer could buy from appellant in the future (59, 63, 66, 106-107). The sample, which contained .63 grams of heroin, was "ten cut," which meant, in narcotics jargon, that its weight could be augmented with additives ten times and still be sold on the street (60, 102). The particular free sample appellant gave to Balmer could have a street value, after diluting its strength with additives, of as much as $3,000 (105).

After receiving the sample, Balmer left the apartment with the promise to return to purchase heroin from appellant if the sample proved to be of as high quality as appellant had said it was (65, 67). Upon leaving the apartment, Balmer met with his surveillance officer, who was waiting outside, and the two of them drove back to their office at the Drug

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*Throughout the trial appellant Gonzalez required the assistance of a Spanish interpreter (13).

Enforcement Agency, where the sample heroin was vouchered, placed in a vault, and subsequently delivered to a DEA chemist (167). The sample heroin (Government Exhibit #4) was introduced into evidence over defense objection (88).*

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*The basis of appellant's objection was that he was not indicted for anything having to do with the January 8 sample heroin (88). For the same reason, appellant had earlier objected to the testimony of the Government's chemist, Robert A. Henderson, concerning his analysis of the January 8 sample, and to the introduction into evidence of Henderson's laboratory report (Government Exhibit #1) of that analysis (35, 39-40, 63). Those objections were also overruled. The Court's response to the objection regarding the introduction of the sample heroin was as follows:

> He does not have to be charged with it, it is part of the evidence. The jury knows he is not going to be charged with. It is not in the indictment....
>
> (88).

Yet, in his opening statement, the prosecutor had told the jurors that the Government witnesses would demonstrate that appellant "is a dealer in heroin and that on three separate occasions he dispensed heroin" (15) (emphasis added). Moreover, in his summation, the prosecutor explained the absence of the January 8 transaction from the indictment as follows:

> As to whether or not the Government should have put a count in there in the indictment charging him with the possession of the rock in this case, I drew up the indictment and I didn't think it should be put in. If I'm wrong, blame me. I didn't think it was necessary in this case. It wasn't actually a sale. It was a gift. So I didn't put it in.
>
> (212-213).

In his charge to the jury, the District Judge failed to instruct the jurors in any way concerning the evidence derived from the January 8 transaction.

On January 16, 1975, at approximately 3:50 p.m., Balmer returned to the same apartment alone, bringing with him $2,200 to purchase an ounce of heroin, while surveillance officers remained outside (68-70, 75). Inside the apartment, in addition to appellant, Balmer met another male Hispanic whom appellant introduced as "Angel," and a young Spanish woman (69). After a discussion concerning the purchase of heroin, appellant attempted to call his "connection" by telephone, but could not reach the party he was calling (70). While Balmer waited, appellant told the woman to show the agent the heroin appellant had given her (72). The woman took from her pocket and showed Balmer three brown rocks similar to the one Balmer had previously received as a sample (73). Upon learning that Balmer had brought $2,200 with him, appellant indicated that the price of an ounce of heroin was $2,300, but that he would accept $2,200 if Balmer could obtain for him a New York State driver's license (73). Balmer agreed to try, and appellant wrote down on a piece of paper the information he wanted the driver's license to reflect. The paper (Government Exhibit #7) was introduced into evidence without objection (75).

Since appellant still had not been able to make contact with his "connection" by 4:20 p.m., Balmer decided to leave, giving as an excuse an appointment he had at 5:00 p.m. somewhere else in Brooklyn (75-76). Subsequently, at 5:10 p.m., he called appellant from a pay telephone in a bar, at which

time appellant told him that the heroin had arrived (77, 121).* Upon returning to the apartment, Balmer gave appellant the $2,200, and received from him approximately an ounce of heroin, which was introduced into evidence (Government Exhibit #5) without objection (88).** There was "a possibility that Angel was there" when this transaction occurred, but Balmer could not definitely recall (78).

On March 4, 1975, Balmer called appellant by telephone and arranged to meet him at the same apartment at 2:00 p.m. the next day in order to buy two ounces of heroin (79-80). When Balmer arrived at the apartment on March 5, "Angel" was again present (80). Balmer had brought with him the driver's license (Government Exhibit #8) appellant had asked him to obtain, and gave it to appellant (81-82, 85).*** Balmer had also brought $4,500 in cash, but was told by appellant that the price of two ounces of heroin was $4,600

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*Appellant had given Balmer a piece of paper with his telephone number and his nickname, "Hippy." That paper, however, was not offered into evidence.

**Henderson, the Government's chemist, testified that he analyzed Government Exhibit #5 and found it to weigh 26.45 grams and to be 47.6% pure heroin (29-30).

***The information on the license matched that contained on the piece of paper (Government Exhibit #7) appellant had given to Balmer on January 16. Appellant had asked for the license, according to Balmer, because his own had been revoked (82). Balmer was also able to obtain the valid license from the New York Motor Vehicle Bureau through the intercession of the Task Force (83-84). Although the prosecution offered the license in evidence (82), appellant objected, and the record neglects to show whether it was ever actually received in evidence.

(85). With apparent approval from appellant, Angel thereupon told Balmer that if he would secure for him as authentic a driver's license as Balmer had obtained for appellant, Balmer need not pay the extra $100 (85, 131). Angel gave Balmer a handwritten note (Government Exhibit #9) containing the information Angel wanted to appear on the license, and Balmer said he would try to get it (86-87). Upon a motion from appellant, Angel then left the room and returned shortly with two ounces of heroin which he gave to Balmer (87, 131).* Balmer was about to give the $4,500 to Angel when appellant moved Angel's hand aside and took the money himself (87).** As Balmer left the apartment, appellant told him that, with advance notice, he could get Balmer any amount of heroin he wanted (88).

The next time Balmer claimed to have seen appellant was some time in early April 1975, when the two of them had lunch together at McDonald's, but Balmer made no notes concerning that meeting (145).*** He did not see appellant again until

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*The two ounces of heroin were introduced in evidence as Government Exhibit #6 (88). The Government chemist testified that he had analyzed the heroin, found it to weight 52.43 grams, and to be 43.2% pure heroin (86).

**While Balmer acknowledged that he considered Angel at this point to be involved in the heroin transaction, it was disclosed at trial that Angel was a fugitive and had not yet been apprehended (132).

***Balmer also acknowledged that at no time during the investigation had he used any other investigative technique, such as dusting for fingerprints, electronic monitoring, or handwriting comparisons (89).

the day of appellant's arrest on April 29, 1975, when appellant, while in custody, passed by Balmer's office (145).

At the conclusion of Balmer's testimony, defense counsel requested the Government to disclose the name or identity of the informant who had introduced Balmer to appellant and had been present during the transaction on January 8 (148). After the jury was excused, argument was had on the application (150-159).* The prosecutor opposed the application on the basis that

> ... during the purchase and sale, the informant was never present when there was a purchase and sale, only present during the introduction.
>
> (150).

The Court stated to defense counsel:

> If you can point out to me that it is absolutely necessary, I will certainly see that there is every effort made to bring him in. But from the mere introduction of this man, and he cannot testify to a purchase, I think it is just petty fogging.
>
> (151).

However, when counsel attempted to set forth his reasons for requesting the informant's identity, the Court retorted, "... you are not going to argue with me" (152), and

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*The colloquy concerning the defense application for disclosure of the informant's identity is "D" to appellant's separate appendix.

the application was ultimately denied.*

In addition to Balmer and the Government chemist, Henderson, the only other prosecution witness was George LeMoine, an officer employed by the New York City Police Department and assigned to the Drug Enforcement Task Force. LeMoine conducted a surveillance of the apartment at 725 Fourth Avenue in Brooklyn on January 8 and 16 and March 5, 1975 (159, 164, 173). On each occasion, he vouchered the narcotics brought from the apartment by Balmer, and subsequently delivered the narcotics to the Task Force laboratory for analysis (160-162, 167, 174). However, he never saw any transaction occur between Balmer and appellant (186). In fact, there is no indication in the record that LeMoine ever saw appellant before April 29, 1975, when he arrested appellant, who was seated in a parked panel truck in the vicinity of Fourth Avenue and 53rd Street, Brooklyn (175-176). While no drugs were found in appellant's possession (185), the driver's license Balmer had secured for appellant was found

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*While the record does not contain a definitive ruling on the application, it is clear from the prosecutor's summation that the application was, in fact, denied:

> I'll grant you ladies and gentlemen the informant was not brought forward. I can give you at least one very good reason why we did not bring the informant in. We don't have to, we don't want to expose them. In this case it is not necessary.
>
> (210).

in appellant's trouser pocket (176-177). The license bore the name "Andres Gonzalez," and the address -- 181 Prospect Park West, Brooklyn -- was the same address Balmer had instructed LeMoine to put on the license (177). Upon verifying the address, however, LeMoine found that there was no-one named Andres Gonzalez living there (177). At the conclusion of LeMoine's testimony, the Government rested its case.

Although appellant offered no evidence in defense, based on counsel's opening statement, cross-examination, and summation, the theory of defense developed as follows: Balmer lied when he testified that appellant was the principal in the transactions, and it was actually Angel who played the role ascribed by Balmer to appellant. Appellant's role was limited simply to allowing his apartment to be used for the transactions and receiving a driver's license for that service (19-20, 132, 146, 203).

In his charge, the District Judge told the jurors, concerning the issue of the credibility of the witnesses:

> Now the important issue here I believe rests upon the credibility of the witnesses and considering the evidence you're goint to have exercise your exclusive function of passing upon the credibility of the witnesses.
>
> (231).

The Court, however, made no reference in the charge to the law of aiding and abetting or acting in concert.

While the foregoing constitutes the facts relevant to the charges on which appellant was tried, there was also another dimension to the trial marked by repeated disparaging and impatient remarks directed to defense counsel by the trial judge, and excessive interference by the trial judge in the examination of witnesses. The facts pertaining to appellant's contention that the trial was marked by impermissible judicial misconduct are set forth in Point II of the argument of appellant's brief.

The jury convicted appellant on August 5, 1975, on the four counts of the indictment. On September 26, 1975, he was sentenced to concurrent five-year terms of imprisonment with a four-year special term of parole to follow completion of service of the prison sentence.

ARGUMENT

Point I

THE TRIAL JUDGE'S REFUSAL TO ORDER DISCLOSURE OF THE IDENTITY OF THE GOVERNMENT INFORMANT, WHO NOT ONLY INTRODUCED THE UNDERCOVER AGENT TO THE SELLER AND WAS PRESENT WHEN SUBSEQUENT NARCOTICS TRANSACTIONS WERE DISCUSSED, BUT ALSO WITNESSED THE TRANSFER BY THE SELLER TO THE AGENT OF A VALUABLE SAMPLE OF HEROIN WHICH WAS INTRODUCED IN EVIDENCE AGAINST APPELLANT, DEPRIVED APPELLANT OF A FAIR TRIAL.

Appellant was convicted of possessing and distributing narcotics based almost entirely on the testimony of one Government witness, the undercover agent Horace Balmer. Yet there existed another witness who could have effectively refuted, or at least cast grave doubt, on Balmer's identification of appellant as the principal seller of narcotics. This witness was the Government informant, Mr. X, who introduced Balmer to the seller, overheard their discussion concerning the future purchase of narcotics, and unavoidably witnessed the seller give the agent a sample of high-grade heroin which was introduced in evidence at appellant's trial. Despite the clear materiality of this witness' testimony, however, the trial judge denied appellant's application to require the Government to disclose the informant's identity, and thereby committed reversible error.

The applicable standard governing the disclosure of the

identity of such informants was set forth by the Supreme Court in Roviaro v. United States, 353 U.S. 53, 60-61 (1957): "Where disclosure of an informer's identity ... is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [of non-disclosure] must give way." Whether the Government should be compelled to disclose the identity of its informant depends on the circumstances of each case, "taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Id. at 62.

But where, as here, the informant's involvement was substantial and his testimony therefore material to critical issues in the case, the conviction must be reversed when the trial judge fails to order disclosure. Roviaro v. United States, supra. See also United States v. Martinez, 487 F.2d 973 (10th Cir. 1969); Gilmore v. United States, 256 F.2d 565 (5th Cir. 1958). Indeed, even while upholding the trial judge's refusal to order disclosure in United States v. Russ, 362 F.2d 843, 845 (2d Cir.), cert. denied, 385 U.S. 923 (1966), this Court warned that

> our opinion is not to be interpreted as affording the government a basis for smug adherence to non-disclosure in all cases. ... This responsibility [to do justice] requires the government to approach a request for the identity of its informant in a spirit of fair-minded pursuit of the truth and not as a "ride to the hounds" event.

Measuring this case by the Roviaro standards with the Russ caveat in mind, there was more than ample basis here to warrant disclosure of the informant's identity. It was the informant who introduced Agent Balmer to the seller on January 8, and the informant was the only other person present while Balmer and the seller discussed the purcahse of narcotics to take place in the future. Thus, the informant was no mere tipster, but rather "an active participant in setting the stage, in creating the atmosphere of confidence beforehand and in continuing it by his close presence during the moments of critical conversation." Gilmore v. United States, supra, 256 F.2d at 567.

Moreover, it was during the negotiations on January 8 that the informant unavoidably witnessed the seller giving Balmer a sample of high-grade Chinese heroin which, according to Balmer, could have a street value of as much as $3,000. That sample was introduced in evidence at appellant's trial over his objection, and informed an important link in the chain of evidence connecting appellant with the subsequent transactions in Chinese heroin on January 16 and March 5.*

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*The introduction into evidence of the January 8 "sample" heroin, and the testimony concerning it, gave the Government the unfair advantage of "having its cake and eating it, too." Since appellant was not charged with conspiracy, but rather with the substantive offenses of possession and distribution of heroin on two specific dates -- January 16 and March 5 -- it is arguable whether the evidence of the uncharged crimes of possession and distribution on January 8 was properly admitted in evidence on the Government's direct case over appellant's objection. United States v. Torres, 519 F.2d 723,

In fact, while appellant was not charged with anything occurring on January 8, the prosecutor appeared to consider the "sample" transaction on that day as though it were a separate offense for which appellant was on trial. In his opening remarks, the prosecutor told the jury that the Government witnesses would demonstrate that "on three separate occasions [appellant] dispensed heroin" (emphasis added), even though appellant was indicted for only two transactions. Thus, not only did the informant set the stage, but in a real sense was almost certainly an eyewitness to one of the criminal (although uncharged) transactions. Compare United States v. Soles, 482 F.2d 105, 106 (2d Cir.), cert. denied, 414 U.S. 1027 (1973), and United States v. Russ, supra, 362 F.2d at 845, where the informants in both cases were not witnesses

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(Footnote continued from the preceding page)

727 (2d Cir. 1975); United States v. Papadakis, 510 F.2d 187 294 (2d Cir.), cert. denied, 95 S.Ct. 1682 (1975). Assuming, however, that the evidence was so probative of appellant's guilt of the two later transactions as to outweigh the enormous prejudice, thereby justifying its admission into evidence, the Government should not also be heard to argue at the same time that the informant's presence at and witnessing of the January 8 "sample" transaction was sufficiently marginal involvement to justify refusal to disclose his identity. Either the January 8 transaction was not probative of appellant's guilt on January 16 and March 5, and therefore the admission of evidence from that day was reversible error, or it was probative and the informant's intimate involvement with those events required the disclosure of his identity.

to the narcotics transactions.*

The disclosure of the informant's identity here** was

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*Since the Government opposed the reduction of appellant's bail prior to trial on, among other grounds, the fact that under New York State law appellant would be facing life imprisonment upon conviction of the offenses for which he was going to be tried in Federal court (see minutes of May 28, 1975, at page 5, Document #15 to the record on appeal), it is interesting to note that had appellant been tried in a New York court, the disclosure of the informant's identity would have been required:

> Undoubtedly the strongest case for disclosure is made out when it appears that the informant was an eyewitness or a participant in the alleged crime. But disclosure of the informant's identity may also be appropriate when, by introducing the parties to each other or performing some other preliminary function he may be considered to have been "an active participant in setting the stage." When however he has played a marginal part by, for instance, merely furnishing a tip or some information to the police, the privilege should prevail absent an extremely strong showing of relevance.
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> People v. Goggins, 34 N.Y.2d 163, 169-170 (1974). (Emphasis added; citations omitted).

**This is not a case in which there is any evidence that appellant already knew the informant's identity or where to find him (compare United States v. Rosario, 327 F.2d 561, 563 (2d Cir. 1964)), or a case in which the informant's testimony could only have been cumulative (compare United States v. Coke, 339 F.2d 183, 184-185 (2d Cir. 1964)). Nor was appellant's right to disclosure of the informant's identity in any way lessened by the fact that he put on no defense. "Unless [appellant] waived his constitutional right not to take the stand in his own defense," the informer may well have been "the only witness in a position to amplify or contradict the testimony of the Government witnesses." Roviaro v. United States, supra, 353 U.S. at 64. Hence, appellant's decision to put on no defense may have been unavoidable, and, in any event, was insignificant in determining his right to disclosure.

especially important in view of the materiality of his testimony to appellant's only possible defense: that Balmer, the only Government witness to the transactions,* lied about appellant's role and implicated him as the principal when Angel, who was present on January 16 and March 5 but a fugitive at the time of appellant's trial, was the one who played the role Balmer falsely ascribed to appellant. "That, to be sure, [was] an issue the defense [was] fully justified in raising, United States v. Soles, supra, 482 F.2d at 109, and in fact appellant did attempt to raise it at various junctures during the trial.**

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*Officer LeMoine, the only other witness directly involved in the case, was never present during any of the transactions and saw no money or drugs change hands. Indeed, while he testified to maintaining a surveillance on the apartment where the transactions occurred, there is no evidence in the record that he ever saw appellant prior to the day of appellant's arrest on April 29.

**There was at least the possibility of another line of defense which would not have been inconsistent with the one defense counsel appeared to pursue. While it might be "highly unlikely that there had been any 'mistaken' identification" since "the undercover agent [had] been with the seller for substantial periods" (United States v. Soles, supra, 482 F.2d at 109), it is possible that Balmer, rather than intentionally lying, confused appellant with Angel when he saw appellant pass by in the offices of the Task Force on April 29, almost two months after the final transaction. That is, while Balmer may have recognized appellant as having been present in the apartment during the actual transactions, the lapse in time may have served to confuse Balmer as to which of the two, Angel or appellant, was the principal in the transactions.

For example, in his opening statement, defense counsel stated:

> We hope to show, through the witnesses, that there is another party who, for some reason, has never been arrested, and you will hear his name, he has never been arrested in this case....
>
> We hope to show you that whether it was a police officer who blundered or whether it is a cover up or what they are trying to do, we hope to bring out through the witnesses that this other person sold the drugs....
>
> Mr. Gonzalez may have been an instrument or a tool of someone else....
>
> (19-20).

Again, during the cross-examination of Balmer, defense counsel attempted, however unsuccessfully, to get Balmer to alter his testimony implicating appellant instead of Angel. Thus, concerning Balmer's certainty that he saw and identified appellant, not Angel, at the Task Force office on April 29, the day of appellant's arrest, defense counsel asked Balmer, "Wasn't there a person there who was the supervisor who said, Look at that man and see if that is Angel?" (146).

Earlier, counsel had sought to establish Angel's involvement in the transactions and the fact that he had not been arrested by asking Balmer:

> Q. At this point, as far as you were concerned, Angel was involved in the heroin deal?
>
> A. Of course he was.
>
> Q. Do you know if Angel has ever been

arrested?

A. He is a fugitive.

(132).

Finally, in his summation, defense counsel argued:

> But [Agent Balmer is] definite and positive that [appellant is] the same man. What an embarrassment if he said that's not the man, no, it's someone else. We can't be naive enough to believe this agent would get up and admit that, if it be the case.... Isn't it more believable to formulate the facts, isn't it more believable maybe this guy Angel was selling the drugs and they used Gonzalez's apartment and Gonzalez got a license as a favor or whatever?

(203).

Nor can it be said that this line of defense was a futile one to pursue and had no chance of success. Despite the enormous resources of the Drug Enforcement Task Force and the availability of the entire gamut of investigative techniques which might have corroborated Balmer's identification of appellant as the principal seller beyond cavil,* the Task Force used none of them. Instead, the Government's case rested almost entirely on the credibility of Agent Balmer. No doubt

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*Balmer testified that there had been no attempt to take fingerprints from the packages containing the heroin purchased, nor any use of electronic monitoring. The failure to use the latter technique is particularly significant since Balmer had occasion to call appellant by telephone and could easily have done so from his office telephone, thereby permitting him either to record appellant's voice or to have someone else listen in on the conversation.

in recognition of the crucial importance of the agent's credibility to the Government's case, the trial judge felt constrained to tell the jurors in his charge: "Now the important issue here I believe rests upon the credibility of the witnesses and considering the evidence you're going to have to exercise your exclusive function in passing upon the credibility of the witnesses."

Unlike United States v. Soles, supra, and United States v. Russ, supra, there was little other evidence to corroborate Balmer's testimony that the person who played the role he ascribed to appellant was, in fact, appellant and not Angel. While appellant, when arrested, was in possession of the driver's license Balmer had obtained for him, and the license and handwritten paper containing information pertaining to the license were introduced in evidence against appellant, appellant never contested the fact that he was present in the apartment on January 16 and March 5 when the transactions were consummated and that he requested and received a driver's license from Balmer. Indeed, defense counsel appeared to conced those facts in summation.* That evidence,

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*While defense counsel appeared to concede, or at least did not contest, that the apartment belonged to appellant and that the handwriting on the paper (Government Exhibit #7) pertaining to appellant's driver's license was appellant's, in fact there was no proof offered by the Government that either of these propositions was actually so. Compare United States v. Soles, supra. In any event, there was no proof, other than Balmer's word, and no concession, that the person Balmer was introduced to by the informant on January 8 was, in fact, appellant and not Angel.

however, was hardly of the level this Court found adequate in Soles, to corroborate the fact that appellant, and not Angel, did what Balmer said he did, particularly since Angel too asked for, and perhaps received, a driver's license from Balmer.

The fact that appellant's apartment was used as the location for narcotics transactions, that he was present when the two charged transactions occurred, and that he even received a driver's license as compensation for any involvement he might have had, might still not have resulted in his conviction if the jury had believed it was Angel who played the principal role in the transactions which was ascribed to appellant. Since appellant was not indicted for acting in concert to commit the possession and distribution crimes for which he was convicted, and the jury was not instructed on the law of aiding and abetting, appellant could have been acquitted completely if the jurors believed it was Angel who set up the deal, actually had physical possession of the narcotics,* and received the proceeds from the transactions.

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*There was a basis in the record for the jury to believe that Angel was the one who actually possessed the narcotics since, at least on March 5, it was Angel who left the room where the negotiations were taking place and returned shortly with the heroin.

Appellant's defense that he merely received a driver's license as consideration for allowing his apartment to be used, and that Balmer lied when he testified otherwise, was one the informant might have confirmed by testimony demonstrating that it was Angel, and not appellant, with whom Balmer met on January 8 to discuss future narcotics transactions. The Court's refusal to order the Government to disclose the informant's identity prevented appellant from interviewing him and possibly proving his only defense.* While it is, of course, impossible to tell what the informant's testimony might have been,

> [i]n this testimony there might have been the seeds of innocence, of substantial doubt, or of overwhelming corroboration. As the inferences from it covered the full spectrum from innocence to guilt, the process of truthfinding, which should be the aim of every trial, compelled its disclosure.
>
> Gilmore v. United States, supra, 256 F.2d at 567.

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*While there was, according to Balmer, a woman present during the January 16 transaction who presumably could have supported appellant's defense, there is no indication in the record of what became of her or whether she was available as a witness at appellant's trial.

Despite defense counsel;s efforts to explain his reasons for disclosure, the trial judge prevented him from doing so (see Appendix "D") and thus the absence from the record on the foregoing line of reasoning concerning the necessity of disclosure cannot be held against appellant. Compare United States v. Russ, supra, 362 F.2d at 845, and United States v. Coke, 339 F.2d 183, 184 (2d Cir. 1964). Moreover, even with his reluctance to order disclosure of the informant's identity, the trial judge could have resorted to the easy and suggested expedient of holding an in camera investigation with the informant to ascertain what his probable testimony would be, whether any danger existed in disclosing his identity, or whether the informant even existed at all. United States v. Soles, supra, 482 F.2d at 110, n.8; Federal Rules of Evidence, Rule 510(c)(2). This the trial judge also failed to do. Instead, pursuant to the prosecutor's "smug adherence to non-disclosure" (United States v. Russ, supra),* the trial judge made short shrift of appellant's request for disclosure.

In sum, the Government informant in this case did not simply play the marginal role of merely furnishing a tip or

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*In his summation, the prosecutor told the jurors that "I can give you at least one very good reason why we did not bring the informant in. We don't have to, we don't want to expose him. In this case it is not necessary."

some information to the Task Force. Rather, to a significant degree he participated in the events which formed part of the offenses charged and almost certainly was an eyewitness to one of the transactions, albeit an uncharged one. His testimony bore directly on the credibility of Balmer's identification of appellant as the principal in the transactions, which was the primary issue in the case and appellant's only possible defense. The ability to call the informant as a witness, or at least to interview him in preparation for the trial, was therefore of critical importance to appellant. The trial court's refusal to require the Government to disclose the informant's identity made this impossible. Since the disclosure of the informant's identity was "relevant and helpful" to appellant's defense, as well as "essential to a fair determination of [the] cause" (Roviaro v. United States, supra), the trial court erred in refusing to order disclosure. Accordingly, appellant's conviction must be reversed.

Point II

THE TRIAL JUDGE'S REPEATED DISPARAGING AND IMPATIENT REMARKS DIRECTED AT DEFENSE COUNSEL, AND HIS EXCESSIVE INTERFERENCE IN THE EXAMINATION OF WITNESSES, ALL DONE IN THE PRESENCE OF THE JURY, REFLECTED AN ATTITUDE OF PARTISANSHIP WHICH DEPRIVED APPELLANT OF A FAIR TRIAL.

Despite what in fact turned out to be a short, uncomplicated trial, the trial judge continually found occasion unfairly to rebuke and denigrate defense counsel and to express impatience with him for counsel's conduct of the defense. Moreover, the trial judge repeatedly intruded himself into the examination of the Government witnesses when there was no clear need to do so. Almost all of these instances took place, unnecessarily, in the presence of the jury, unavoidably conveying to the jury an attitude of partisanship on the part of the judge. In a case "[w]here the defendant's guilt or innocence rest[ed] almost exclusively on the jury's evaluation of [Agent Balmer's] demeanor and credibility," such conduct by the trial judge, "which so clearly signal[ed] to the jury the judge's partisanship," prejudiced appellant's right to a fair trial. United States v. Nazzaro, 472 F.2d 302, 310 (2d Cir. 1973); United States v. Brandt, 196 F.2d 653, 655 (2d Cir. 1952).

Prejudicial Comments Directed at Defense Counsel*

On a number of occasions the trial judge expressed his impatience with defense counsel and accused him of "wasting time." For example, while defense counsel was attempting to cross-examine the Government's chemist concerning the heroin from the January 16 transaction, the following colloquy occurred:

> [MR. LIGHT:] At the time you received it, it was alleged, until you made your analysis --
>
> THE COURT: Oh, my, we are wasting time.
>
> MR. LIGHT: Judge, I am reading from the report.
>
> THE COURT: That has nothing at all to do with it, he alleged -- what is printed up there, "alleged"?
>
> MR. LIGHT: Yes, Your Honor:
>
> THE COURT: Of course, before the analysis.
>
> MR. LIGHT: That is what my question was going to be.
>
> THE COURT: But it is not testified to that it is heroin until --
>
> MR. LIGHT: I didn't get up to that, Judge.
>
> THE COURT: The jury is way ahead of you.

---

*Since there is no point to be served in setting forth all instances of such conduct, only exemplative ones will be set forth in full, with page citations to the record concerning the remainder.

MR. LIGHT: It is a very short trial.

THE COURT: It won't be at this rate.

(43-44).

On another occasion, while counsel was cross-examining Agent Balmer concerning the heroin which was shown to him on January 16 by the woman in appellant's apartment, the following ensued:

> MR. LIGHT: And in the report it says it was in aluminum foil. You did not tell us about that, did you?
>
> BALMER: In aluminum foil is not heroin. It is not illegal to have aluminum foil, sir.
>
> MR. LIGHT: If heroin is not to be preserved in aluminum foil or plastic bag?
>
> MR. CUNNINGHAM: I am going to object. We are going far afield.
>
> THE COURT: Oh, yes. Do not waste so much time, Mr. Light.
>
> (123-124).

And again, while counsel was cross-examining Balmer, the key Government witness, the trial judge expressed his impatience with counsel over the length of the cross-examination, despite the fact it covers only sixty pages of the record:

> THE COURT: Come on, we can't -- we have to finish his cross-examination tonight, Mr. Light. You have been on it I don't know how long, but it was quite a lengthy time on cross-examination, so I suggest you complete the cross-examination in five minutes.

[Continuing] Q. Do you see in this laboratory report where it says the date of the purchase which was written, typewritten, 2/5/75, and it was written over with ink to make it into a 3?

A. Yes, I do, it is a typographical error.

Q. Did you type that?

A. No, I didn't.

Q. But you are telling us it is a typographic error?

THE COURT: He is testifying when he actually purchased --

MR. LIGHT: I am trying to show --

THE COURT: I know, we are wasting an awful lot of time here.

(141-142).

On at least two other occasions the court expressed similar impatience with counsel, intimating that counsel was wasting the court's and the jurors' time (120, 147).

There were other instances, however, in which the trial judge was more directly critical or abusive of defense counsel. For example, while counsel was cross-examining the Government's chemist concerning whether he had heard anything from the agents concerning appellant (46-48), the following colloquy between the Court and counsel occurred:

THE COURT: That is not in evidence, he doesn't have to answer that because that is going to be subject to further testimony.

Where have you been in the last half hour, Mr. Light?

MR. LIGHT: Judge, I asked --

THE COURT: Do you have any further questions of the analyses? Otherwise, I'm going to ask you to sit down.

MR. LIGHT: With your Honor's permission, I would like to have him be subject to recall.

THE COURT: There is not going to be any recall.

Please sit down if you are finished.

You are not going to do that in this Court.

MR. LIGHT: Judge, if I can't --

THE COURT: Sit down --

Do you have any further questions to ask him about the analysis?

MR. LIGHT: Judge, may I be heard?

THE COURT: You have been heard quite a bit.

MR. LIGHT: I can't get a word in, Judge.

THE COURT: Just ask the questions and stop arguing.

Have you got any real questions to ask him? Ask him on the analysis.

MR. LIGHT: Judge, with all due resepct, all my questions are real.

THE COURT: But irrelevant.

(49-50).

On another occasion, while counsel was attempting to cross-examine Agent Balmer concerning the propriety of his conduct in applying for and receiving a license in appel-

lant's name (110), the following interchange was had between counsel and the Court:

> MR. LIGHT: Any way you put it, something improper was done.
>
> THE COURT: It was not improper.
>
> Do you want to get on the stand and testify what is improper in the law, I will listen to you.
>
> MR. LIGHT: It is up to the jury to decide.
>
> THE COURT: I know, but you are making statements that would require an expert on what is improper, and I am not going to let you do it unless you get on the stand and we have an opportunity for cross-examination.
>
> MR. LIGHT: Judge, I would say that you should take judicial notice of the fact that this defendant never applied for a license and someone got him a license and something was done --
>
> THE COURT: The witness testified as to exactly what was done. You may not like that but that is the way the laws are enforced.
>
> MR. LIGHT: I mean, your Honor --
>
> THE COURT: Did you do this through the Bureau?
>
> THE WITNESS: This was my first time.
>
> THE COURT: Your first time?
>
> THE WITNESS: We tried it before in the State Department but they turned it down.
>
> [By Mr. Light] Q. Did you ever violate the law or break the law to enforce the law?

A. Giving him a driver's license, you can say I didn't break the law.

Q. Did you ever smoke marijuana and suppressed --

THE COURT: I don't know what that has to do with it, smoking marijuana.

I ask the jury to disregard those questions completely.

MR. LIGHT: Do we have the notes?

THE COURT: You are drawing a red herring [*] across the trail, you have no right to ask those questions, you know you don't have the right and I am telling you.

MR. LIGHT: I have a right on cross-examination.

THE COURT: You don't have the right, you absolutely do not have the right to do what you want to under any circumstances.

MR. LIGHT: I don't have an absolute right --

THE COURT: I don't want any more arguments, you are arguing, you know you have no right to ask this man if he has the right to smoke marijuana in order to induce somebody else --

MR. LIGHT: I didn't ask him if he had a right, I asked him if he smoked

---

*The accusation by the trial judge that counsel was "drawing a red herring across the trail" (112) was one the trial judge repeated on at least two other occasions (189, 190). That phrase took on a particularly prejudical cast by dint of the fact that the prosecutor, in his summation, adopted it as his own and, on no less than seven occasions, claimed that various aspects of the defense strategy were "red herrings" (210, 211, 213, 213, 215, 216).

marijuana.

THE COURT: That is irrelevant, too.

MR. LIGHT: It goes to his credibility.

THE COURT: It doesn't go to his credibility.

MR. LIGHT: To see if he ever broke the law.

THE COURT: You know, I'm going to tell you if I make a ruling next time, whether you like it or not, you put in an objection and you have your remedy upstairs, but I don't want any argument.

MR. LIGHT: All right, I am sorry, I apologize to the Court.

THE COURT: I don't want to tell the jury anything further about the situation, see if you can get that.

(111-113; emphasis added).

In a similar vein, the trial judge accused counsel of having "made a speech" (40, 48), of "confusing the issue" (51), and of arguing improperly (97, 191).* Moreover, as a consequence of the Court's obvious annoyance with counsel, it issued veiled threats to "Proceed, otherwise there are going to be some other statements made" (153) and "you are not going to argue with me because there is going to be a problem" (48).

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*This exchange on page 97 is significant for the fact that it was the only occasion on which the trial judge afterwards resorted to the reasonable expedient of calling defense counsel to a sidebar conference outside the jury's hearing to advise him of the impropriety of his questions.

While all of these remarks indicating the trial judge's displeasure were directed at defense counsel, rather than at the defendant, "they undoubtedly gave the jury the impression that the defendant's case was of little substance and was not worthy of very much attention." United States v. Coke, supra, 339 F.2d at 185. Whether or not some or many of the criticisms are justified, "[w]here mild admonitions to counsel did not suffice, any sterner or more forceful directions which may have been warranted should have been given in the absence of the jury." Ibid.

Interference in the Examination of Witnesses*

In addition to the caustic remarks directed at defense counsel, the trial judge also injected himself repeatedly and persistently throughout the course of the trial. By continually rehabilitating Government witnesses and interrupting defense counsel's cross-examination, the trial judge destroyed the "impartial, judicious atmosphere" (United States v. Brandt, supra, 196 F.2d at 655) essential to the fair and decorous trial to which appellant was entitled. United States v. Mazzaro, supra; United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970).

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*Here, again, only examples will be given, with page citations to other instances of the contested conduct.

During the prosecutor's direct examination of Agent Balmer, the trial judge interrupted and took it over in the following fashion:

> Q [By Mr. Cunningham]: Sir, after leaving the defendant's apartment with this quantity or sample of heroin --
>
> THE COURT: Wait a minute, I hate to interfere and I probably won't any more, but for the sake of the jury, because if I don't understand, I wonder whether the jury understands it, you just said -- you said you were going to purchase some: Did you promise to purchase some heroin? It is a little unusual for him to give you a sample without your making some promise that if it is okay you might purchase some, isn't it.
>
> THE WITNESS: No, your Honor, you see, when a person --
>
> MR. LIGHT: Your Honor, I object to that --
>
> THE COURT: Never mind, I asked the question and I am going to let him answer it.
>
> MR. LIGHT: He is going to tell us what someone else did.
>
> THE COURT: You can go ahead and answer the question.
>
> Why doesn't that happen?
>
> THE WITNESS: When -- when you purchase heroin and you are going to purchase an ounce or in the upper level, it is a known fact that you ask for a sample of what you are going to buy in the future and this --
>
> THE COURT: And you can do that without making any promises?
>
> THE WITNESS: You tell him that if it

is okay you will be back, but if it is not --

THE COURT: No specifics?

THE WITNESS: No, he only gives you a small amount as a sample anyway.

THE COURT: I see, all right.

(65-67).

On another occasion, while the prosecutor was questioning Balmer about the license he secured for appellant, a key piece of evidence since it was essentially the only corroboration of Balmer's testimony, the trial judge once again interrupted and took over the prosecutor's examination:

MR. CUNNINGHAM: I offer it in evidence as Government Exhibit 8.

MR. LIGHT: I will object to it.

THE COURT: Let me ask you a quesion.

Mr. Gonzalez could not get his own license, do you know?

THE WITNESS: He told me he could not get a New York State driver's license.

THE COURT: Why?

THE WITNESS: We really never got into it. I believe he stated that his license had been revoked.

MR. LIGHT: I object to what he believes.

THE COURT: Yes. You do not know? Did he say that?

THE WITNESS: It had been revoked. He used the word "revoked". He didn't

tell me what happened.

THE COURT: He said he could not get it?

THE WITNESS: That is correct, your Honor.

THE COURT: Why could you get it then? It is in the same name.

THE WITNESS: That is correct.

THE COURT: How is it you could get it?

THE WITNESS: Okay. In my office we have three different types of law enforcement officers. We have State, Federal and local. We were able to obtain the license through the Motor Vehicle Department.

THE COURT: Of course, I know that you could not get it from any other department.

THE WITNESS: That is right. My job in the street as an undercover agent --

MR. LIGHT: May I state this is very important, this is a very important area that I was going into on cross-examination and you are taking my thrust away.

THE COURT: May I state as a judge I have a right to ask questions and I am going to do it. Go ahead.

(82-83).

On a further occasion, also while the prosecutor was questioning Balmer, the Court again interrupted and elicited the significant fact that all of Balmer's transactions with appellant were conducted in English, with no difficulty

understanding on either side (58-60).*

While defense counsel was cross-examining Balmer, the Court continued to interject itself at crucial points, interrupting defense counsel and rehabilitating the witness simultaneously. For example, as counsel was questioning Balmer as to whether he could have used a monitoring device to corroborate his testimony, the following interruption occurred:

> Q. Did you put a listening device on the telephone to record that conversation?
>
> A. No, I did not.
>
> Q. Then you returned.
>
> THE COURT: Did you think it was necessary?
>
> THE WITNESS: No, I didn't.
>
> THE COURT: You have seen the defendant, didn't you?
>
> THE WITNESS: That is right.
>
> THE COURT: And you had gotten to recognize his voice when the phone was answered, didn't you?
>
> THE WITNESS: That is right.
>
> THE COURT: All right.
>
> Q [by Mr. Light] Did you ever have

---

*Since appellant was assisted by a Spanish interpreter at trial, his ability to speak and understand English was clearly a relevant issue in the case, and one which the prosecutor could have pursued himself.

a case with your enforcement agency where they record the conversation so the person cannot get up in court and deny it is him and it is very important to have it?

A. That is from the office but not from a bar where I make a call.

Q. Did you ever call him from the office?

THE COURT: Can you put a recording device at a bar when you make the call?

THE WITNESS: You can do it but everybody would see what you are doing.

THE COURT: It would be a public telephone where you would have to do it, wouldn't it?

THE WITNESS: Yes.

(120-121).

Other examples of the Court's interference in the proceedings, either during the prosecution's or defense's examination of the witnesses, occur on the following pages of the transcript: 34-36, 41-42, 43, 48, 51, 83-85, 92, 111, 132-133, 141, 189, 192, 204.

While it may be true that "[o]ne of the glories of the federal criminal law administration [is] that a district judge is more than a moderator or umpire and has an active responsitility to see that a criminal trial is fairly conducted" (United States v. Curcio, 279 F.2d 681, 682 (2d Cir. 1960)), the trial judge's undue participation in the instant case exceeded the bounds of proper judicial decorum. Accordingly, appellant's conviction must be reversed. United

States v. Nazzaro, supra; United States v. Musgrave, 444 F.2d 755 (1971); United States v. Langram, 416 F.2d 1140 (5th Cir. 1969); United States v. DeSisto, 289 F.2d 833 (2d Cir. 1961).

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

December 11, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

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